IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 84221

CITY OF LAS VEGAS, a political subdivision of the State of Nevada,

Petitioner

v.

EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, and the Honorable Timothy C. Williams, District Judge,

Respondents

and

180 LAND CO, LLC, a Nevada limited-liability company, FORE STARS LTD., a Nevada limited liability company,

Real Parties in Interest

District Court Case No.: A-17-758528-J
Eighth Judicial District Court of Nevada

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF CERTIORARI

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. The City of Las Vegas is a political subdivision of the State of Nevada and has no corporate affiliation.
2. The City is represented by the following:
    a. Las Vegas City Attorney's Office
    b. McDonald Carano LLP
    c. Shute, Mihaly & Weinberger, LLP
    d. Leonard Law, PC

DATED this 15th day of March, 2022.

LEONARD LAW, PC

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INTRODUCTION

This is a contested inverse condemnation case where liability is in dispute, not an eminent domain case in which the condemnor has obtained an order of occupancy. Because the City has not taken permanent physical possession of the property, NRS 37.170 does not apply, and the primary authority on which the Developer relies, *State ex rel. Dep't of Highways v. Second Jud. Dist. Ct.*, 75 Nev. 200, 205, 337 P.2d 274, 277 (1959), is inapplicable. NRCP 62 entitles the City to a stay without posting a bond, and NRAP 8(c) militates in favor of a stay. Nothing presented in the Developer's Answer alters this conclusion.

In fact, the Answer is notably silent on key dispositive arguments, namely that:

1. NRS 37.140 requires payment within 30 days of a "final judgment," which NRS 37.009(2) defines as one that can no longer be challenged on appeal;
2. The Developer improperly segmented the Badlands for the purpose of its development applications and lawsuits;
3. The City approved substantial development on the parcel as a whole;
4. The Developer knew at the time it acquired the Badlands that the property was designated PR-OS in the General Plan, and houses are not an allowed use in PR-OS; and

5. A long line of Nevada precedent holds that a developer has no vested property right to have discretionary land use applications approved.

Having failed to address these points, the Developer concedes their merits. *See Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating party's failure to respond to an argument as a concession that the argument is meritorious). Given these concessions and the Developer's erroneous legal arguments, the Answer fails to set forth any justification to deny a stay.

ARGUMENT

A. The Developer's Argument That NRS Chapter 37 Prohibits A Stay Is Premised On Two Conditions That Do Not Exist: A Final Judgment Within The Meaning Of NRS 37.009(2) And Physical Possession

1. The Developer Does Not Dispute That A "Final Judgment," As Defined By NRS 37.009, Does Not Yet Exist

The Developer's Answer fails to address that, although NRS 37.140 states that payment must be made within 30 days of a final judgment, an eminent domain judgment does not become "final" until it can no longer be challenged on appeal. NRS 37.009(2). Because the Judgment is not final within the meaning of NRS 37.009(2), it did not trigger the 30-day deadline for payment specified in NRS 37.140. The Developer concedes this point.

2. NRS 37.170 Does Not Apply Because The City Has Not Taken Possession Of The 35-Acre Property

To evade the plain language of NRS 37.009(2), the Developer tries to shoehorn this case into NRS 37.170 by mischaracterizing the City's regulatory decisions as having taken "possession" of the Developer's property. According to the Developer's distorted citation of the facts, by denying certain applications and passing a short-lived bill to increase opportunities for public participation in land use changes, the City has "possession" of the 35-Acre Property and therefore, pursuant to NRS 37.170, must pay the Judgment as a pre-condition to appeal. Answer at 22. This argument fails on all fronts.

a. On Its Face, NRS 37.170 Does Not Make Payment Of A Judgment A Precondition Of Appeal

Contrary to the Developer's assertion, nothing in the language of NRS 37.170 can be construed to precondition appeal rights on the payment of a judgment. *See id.* NRS 37.170 applies to situations in which a government entity has exercised its rights to eminent domain and obtained occupancy, which does not exist here: "[T]he plaintiff, ***if already in possession***, may continue therein, and if not, the court shall, upon motion of the plaintiff, authorize the plaintiff ***to take possession of and use the property*** during the pendency of and until the final conclusion of the litigation." *Id.* (emphases added).

The primary authority on which the Developer relies – and convinced the district court to erroneously embrace – provides only that a condemnor in an eminent domain action that has been granted immediate occupancy can be required to pay a just compensation award as "a condition to the condemnor's right to maintain an appeal ***while remaining in possession***." *State*, 75 Nev. at 205, 337 P.2d at 277 (emphasis added). It does not pre-condition appeal rights. *See id.* By its terms, *State*, an eminent domain action, does not apply in an inverse condemnation action such as this, where the City has merely regulated the owner's use of the property, is not in possession of the property, and has no need for the property.

In addition to being inapplicable, *State* pre-dates the seminal regulatory takings decision, which holds that courts must conduct "ad hoc, factual inquiries" into the circumstances of each particular case. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Because unlike in a direct condemnation case, the City very much disputes liability here, a de novo case-by-case factual inquiry under NRAP 8(c) is warranted, rather than blanket application of NRS 37.170.

While the Court has stated that eminent domain "rules and principles" govern inverse condemnation actions (*Clark County v. Alper*, 100 Nev. 382, 391, 685 P.2d 943, 949 (1984)), there is no language in NRS Chapter 37 to support the notion that every provision of the chapter is applicable to inverse condemnation.

For example, because liability for the taking is conceded by the filing of an eminent domain action, and the only issue remaining is the amount of just compensation, eminent domain rules cannot possibly provide standards for liability for a regulatory taking, where liability is contested. *Alper* addressed only one statutory provision, NRS 37.120(1)(b), regarding the date of valuation, which is an issue in common between inverse and direct condemnation. 100 Nev. at 391, 685 P.2d at 949. The district court stretched *Alper* beyond reason when concluding that NRS 37.170 deprives the government of its right to a stay in any inverse condemnation case where the government has not taken possession of the property. "[S]tatutory interpretation should avoid absurd or unreasonable results." *Alsenz v. Clark Cty. Sch. Dist.*, 109 Nev. 1062, 1065, 864 P.2d 285, 286 (1993).

b. The City Has Not Occupied The 35-Acre Property

State also does not apply here because the City is not in possession. Nevada law treats the term "possession" as synonymous with "occupancy." *See State*, 75 Nev. at 201, 337 P.2d at 274 (concluding that possession occurred upon condemnor receiving order of immediate occupancy); *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 119 Nev. 429, 438, 76 P.3d 1, 8 (2003) (same); *Argier v. Nevada Power Co.*, 114 Nev. 137, 141, 952 P.2d 1390, 1393 (1998) (same); *see also McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 662–63, 137 P.3d 1110, 1122 (2006) (defining a per se taking as "physical

possession of the property" and forced "acquiesce[nce] to a permanent physical occupation"). The City has not physically occupied the 35-Acre Property, and the Developer provides no evidence to prove otherwise.

In the absence of such evidence, the Developer grasps at three baseless assertions of an alleged "physical occupation" to invoke NRS 37.170: denial of a fence application; denial of an application to add new access points; and passage of a short-lived bill that provided for greater public participation in proposals to repurpose golf courses. Answer at 34-35. A regulation does not effect a physical taking unless it permits the government or the public to physically occupy the owner's property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 436 (1982); *see also Tahoe-Sierra Pres. Council, Inc. v Tahoe Regional Planning Agency*, 535 U.S. 302, 323 (2002) (noting "longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other").

None of the three regulatory decisions referenced by the Developer triggers the application NRS 37.170 because they: (1) did not give the City "possession" of the 35-Acre Property or authorize public use; (2) did not deprive the Developer of its possession of the property; and (3) were not permanent. *See Sisolak*, 122 Nev. at 662-663, 137 P.3d at 1122 (requiring "permanent physical invasion" for a "per se taking" to exist).

i. The City's Denial Of The Developer's Fence Application Was Neither A Permanent Physical Occupation Nor An Exercise Of Possession

Contrary to the Developer's misleading assertions, the City did not physically occupy the 35-Acre Property (permanently or otherwise) or prevent the Developer from excluding others by denying its fence application. For nearly 20 years, the Developer and its predecessor used, possessed, enjoyed and otherwise exercised their rights to the Badlands without the new fencing the Developer sought in 2017. II(0349-03553). When the Developer filed an application to construct additional fences, the Acting Planning Director simply informed the Developer that a different application would be required:

> I have determined that the proximity to adjacent properties has the potential to have significant impact on the surrounding properties. As such, the Minor Development Review (Building Permit Level Review) is denied and an application for a Major Review will be required pursuant to LVMC 19.16.100(G)(l)(b).

12RA02621.

On its face, nothing in this denial constituted a physical occupation of the property (permanent or otherwise) or a decision to prevent the Developer from excluding others (permanent or otherwise). 12RA02621. Nor did this denial "announce[] to the public and the surrounding neighbors that the Landowners' private property was theirs to use for recreation and open space," as the Developer disingenuously contends. Answer 5. Rather, the City simply required the

Developer to complete a different application and invited the Developer to "coordinate with the Department of Planning the submittal of a Major Site Review," which the Developer failed to do. 12RA02621. As a result, the district court erred as a matter of law by deeming the City's requirement that the Developer apply for fencing to constitute "possession" of the 35-Acre Property that amounted to a "per se" taking. VI(1133); *see Sisolak*, 122 Nev. at 662-663, 137 P.3d at 1122.

ii. The City's Denial Of The Developer's Application For New Access Points Was Neither A Permanent Physical Occupation Nor An Exercise Of Possession

Similarly, the City did not physically occupy (permanently or otherwise) or deprive the Developer of its possession and use of the 35-Acre Property by denying its application for new access points. For nearly 20 years, the Developer and its predecessor used, possessed, enjoyed and otherwise exercised their rights to the Badlands with the existing access points, which included vehicular access from public streets at multiple locations. IV(0737). After the Developer closed the golf course in 2016, the Badlands retained the same vehicular access. *Id*. The Judgment's assertion that the City denied the Developer access to the 35-Acre Property is therefore incorrect.

When the Developer filed an application in 2017 to construct new access points that did not previously exist, the Acting Planning Director simply informed the Developer that a different application would be required:

> After reviewing the permit submitted (L17-00198) for perimeter wall modifications and controlled access gates on the subject site, I have determined that the proximity to adjacent properties has the potential to have significant impact on the surrounding properties. As such, the Minor Development Review (Building Permit Level Review) is denied and an application for a Major Review will be required pursuant to LVMC 19.16.100(G)(1)(b).

12RA02615.

On its face, nothing in this denial constituted an occupation of the property by the City (permanent or otherwise) or a decision that prevented the Developer from possessing and using the property (permanent or otherwise). 12RA02615. Nor did it "oust" the Developer or authorize public use, as the Developer disingenuously contends. Answer 23, 35. To the contrary, the City simply invited the Developer to file a different application. 12RA02615 ("Please coordinate with the Department of Planning for the submittal of a Major Site Review.").

The Developer's reliance on *Schwartz v. State* is misplaced because that case involved the state highway department cutting off the owner's existing access to the highway abutting its property. 111 Nev. 998, 1001, 900 P.2d 939, 941 (1995). In contrast, here, the City did not impair the Developer's existing access rights. IV(0737). And the Developer does not have a "right" to construct new access

points wherever and however it wants that can be "taken" simply because the City requires compliance with its Code. LVMC 19.16.100(G)(1)(b).

The City has discretion to implement its Code provisions to ensure that modifications to existing land uses are compatible with their surroundings. *See generally* UDC 19.00.030. To the extent the Developer contends the City's application process was too burdensome or that the City's requirements were a pretext to prevent development of the 35-Acre Property, the 25-day statute of limitations to challenge the City's denial expired in 2017 without the Developer filing a petition for judicial review. *See* NRS 278.0235. As a result, the district court erred as a matter of law by deeming the City's denial of the application for new access points to have put the City in "possession" and amounted to a "per se taking." VI(1133-34).

iii. The City's Passage Of Two Bills Related To Golf Course Repurposing Did Not Effect A Physical Occupation Of The 35-Acre Property

Likewise, passage of two bills related to golf course repurposing did not constitute "possession" of the 35-Acre Property within the meaning of NRS 37.170. Bill 2018-24, passed in November 2018 and repealed in January 2020, did not apply to the 35-Acre Property because it applied only to "any proposal by or on behalf of a property owner to repurpose a golf course or open space." 13RA02722-02723. While the bill was in effect, the Developer filed no "proposals" to

repurpose the 35-Acre Property. VII(1146-1160). The City denied the Developer's Application for the 35-Acre Property on June 21, 2017, and the Developer filed suit, including claims for a physical taking, on September 24, 2017, 18 months and 15 months, respectively, **before** Bill 2018-24's passage. I(0009-0027). Accordingly, Bill 2018-24 did not apply to the 35-Acre Property.

Even assuming *arguendo* Bill 2018-24 applied, it did not constitute "occupation" of private property. The Judgment erroneously concluded that Bill 2018-24 required the Developer to allow the public to physically occupy the 35-Acre Property and thus effected a physical taking, similar to the statutes at issue in *Sisolak* and *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021). V(0894-0896). In *Sisolak*, the ordinance exacted an easement that required private property owners to submit to permanent occupation of their airspace by commercial airplanes. 122 Nev. at 667, 137 P.3d at 1125. In *Cedar Point*, a statute compelled the owners of certain private industrial facilities to grant a permanent easement to labor union organizers to physically enter their property. 141 S.Ct. at 2072.

In contrast, Bill 2018-24 did not authorize public access but rather required a developer to discuss alternatives to the proposed golf course redevelopment project with interested parties and report to the City. 13RA02731-02732. Only if a developer planned to ***maintain*** ongoing public access did it have to document such plans and ***only*** if requested by the City. 13RA02731-02732. The City never

notified the Developer that it should submit a plan under Bill 2018-24, and the Developer did not do so. IV(0738-0739). Accordingly, Bill 2018-24's requirement to document ongoing public access did not apply to the 35-Acre Property. IV(0739); 13RA02731-02732.

Bill 2018-5, adopted on May 16, 2018, also did not authorize public access. 13RA02712-02717. Rather, the bill created a process for public engagement, did not impose substantive requirements for a development project or authorize public use, and cannot be construed as having taken physical possession of private property. 13RA02712-02717. The Developer's Answer provides no analysis of how this bill supposedly effectuated a physical taking of the 35-Acre Property. As a result, the Developer's contention that these bills amounted to "possession" as that term is used in NRS 37.170 is misplaced.

iv. The Developer Did Not Recover Any Damages For A Physical Taking

Importantly, the Developer does not dispute that it neither asked for, nor was awarded, any damages for an alleged physical invasion of the 35-Acre Property. The Judgment awards damages to the Developer for its categorical and *Penn Central* claims based on an appraisal submitted by the Developer. V(0935-0945). That appraisal concluded that the City' regulation of the Developer's use wiped out the value of the Property, not any physical "possession" by the City. V(0935-0945). The Developer's failure to present evidence of damage from a physical

occupation underscores that the City did not dispossess the Developer from its property.

B. The Developer Fails To Overcome The Law That Entitles The City To An Automatic Stay

1. There Is No Conflict Between NRS Chapter 37 And NRCP 62 In This Case

Because the City does not have "possession," the Developer's contention that NRS 37.170 conflicts with NRCP 62 fails. Absent any conflicting provision in NRS Chapter 37, the Developer is compelled to agree that NRCP 62 authorizes the City to obtain a stay without bond pending appeal. Answer 24. The Developer does not even address, much less dispute, the applicability of *Clark Cty. Off. of Coroner/Med. Exam'r v. Las Vegas Rev.-J.*, 134 Nev. 174, 177, 415 P.3d 16, 19 (2018) (NRCP 62(e) must be read conjunctively with NRCP 62(d) to grant government agency right to stay pending appeal without posting bond).

2. NRCP 62 And NRAP 8(c) Supersede Any Conflicting Procedural Provisions In NRS Chapter 37

To the extent any conflict can be construed to exist, an automatic stay without bond is still warranted because the Court's procedural rules take precedence over a conflicting statute:

> [T]he legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers, and that such a statute is of no effect. Furthermore, where ... a rule of procedure is promulgated in conflict

> with a preexisting procedural statute, the rule supersedes the statute and controls.

State v. Second Jud. Dist. Ct. ex rel. Cty. of Washoe, 116 Nev. 953, 959–60, 11 P.3d 1209, 1213 (2000), *quoting State v. Connery*, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983) (alterations in the original).

> Pursuant to the doctrine of separation of powers, it is clear that the judiciary, as a coequal branch of government, has inherent powers to administer its affairs, which include rule-making and other incidental powers reasonable and necessary to carry out the duties required for the administration of justice. Any infringement by the legislature upon such power is in degradation of our tripartite system of government and strictly prohibited….
>
> [T]he inherent power of the judicial department to make rules is not only reasonable and necessary, but absolutely essential to the effective and efficient administration of our judicial system, and it is our obligation to insure that such power is in no manner diminished or compromised by the legislature.

Goldberg v. Eighth Jud. Dist. Ct., 93 Nev. 614, 615-17, 572 P.2d 521, 522-23 (1977). Under this authority, NRCP 62 and NRAP 8 prevail over NRS 37.170, and the Developer's general vs. specific argument adopted by the district court is inapplicable.

C. The Developer's Analysis Confirms That The NRAP 8(c) Factors Warrant A Stay

1. The Developer Does Not Dispute That The City Council's Discretionary Decision-Making Authority Under Chapter 278 Will Be Defeated Absent A Stay

The Developer's Answer does not address the grave impacts the Judgment

imposes on the City Council's obligation to "regulate and restrict" development according to its General Plan. NRS 278.250(1)-(2). It also completely ignores the Court's long line of cases holding that zoning does not confer a vested right because the City has discretionary authority to restrict land uses to protect the public interest. *See Stratosphere Gaming v. City of Las Vegas*, 120 Nev. 523, 527-28, 96 P.3d 756, 759-60 (2004); *Tighe v. Von Goerken*, 108 Nev. 440, 443, 833 P.2d 1135, 1137 (1992); *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 807, 898 P.2d 110, 112 (1995).

The object of the City's appeal is not just to overturn a grossly erroneous and excessive monetary judgment. It is also to ensure that the Council continues to exercise its duties and discretion under NRS Chapter 278 to regulate land use for the common good. By holding that the City must pay compensation for denying any application simply because the proposed use happens to be permitted within the zoning district, the Judgment chills the Council from doing its job as mandated by NRS Chapter 278.

2. The Developer Mischaracterizes The Nature Of The Irreparable Harm The City Claims

In disputing the Judgment's irreparable harm, the Developer misleadingly characterizes the City as arguing it will "need to approve every single application that comes before it based on the district court orders." Answer 26. That is not what the City's Petition states. Rather, according to the Judgment, the Council will

need to approve every application so long as it does not seek a zoning change. II(294); V(0899-0906, 0912-0915); VI(0987-0990). In other words, no matter if a proposed project that proposes a use permitted by the applicable zoning violates every other provision of the City's General Plan or zoning Code, or will be harmful to the City's environment, the Judgment says failure to approve it constitutes a taking. II(294); V(0899-0906, 0912-0915); VI(0987-0990). Moreover, under the Judgment, whenever an agency downzones property or amends a zoning ordinance to impose new restrictions, the agency must compensate every property owner in the zone for a "taking" of their "property rights" in the prior zoning. These scenarios, which jeopardize the State's entire system of land use regulation, are a very real probability, not "unsubstantiated hyperbole" as the Developer contends. V(0777).

3. The Developer Fails To Identify Any Irreparable Harm To Itself

In arguing that it will purportedly suffer irreparable harm from a stay, the Developer rehashes the inapplicable *State* decision, incorrectly attributes statements by a former Councilmember to the City as a whole, and identifies only alleged monetary damages. It is well established that compensatory damages do not constitute irreparable harm unless they will be irretrievable at the end of the litigation. *See McDaniel v. Sanchez*, 448 U.S. 1318, 1322 (1980); *Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1029 (1987). Delayed payment of the

Judgment, a property tax reimbursement, and "carrying costs" are all compensatory damages. In the unlikely event that the Developer prevails on appeal, it will be compensated for the delay through the payment of interest. As a result, it will suffer no irreparable harm from a stay.

4. The Developer's Analysis Confirms The City Will Prevail On Appeal

a. The Developer Fails To Identify Any Vested Property Rights That Were Taken By The City

The lynchpin of the Developer's takings argument falls flat because zoning does not confer a vested right that was "taken" by the City. Ignoring *Tighe*, *Am. Dev. W.*, *Stratosphere*, *Nova Horizon*, and *Cold Springs*, the Developer points to NRS 278.349(3)(e) to prop up the erroneous Judgment. The district court established in the PJR Order that "NRS 278.349(e) does not confer any vested rights." I(0150). On its face, NRS 278.349(3)(e) relates only to tentative map applications, not a waiver of the City's development standards, a General Plan Amendment to change the PR-OS designation or a Site Development Plan review required to develop the 35-Acre Property. The PR-OS designation, which does not permit housing, had existed since 1992 and, as the Developer knew when it bought the Badlands and filed the Application, remains the applicable law. II(0394-0397, 0406-0426); III(0427-0474).

Additionally, state law and the City's Code are clear that the General Plan takes precedence over zoning.

> Except as otherwise authorized by this Title, approval of all Maps, Vacations, Rezonings, Site Development Plan Reviews, Special Use Permits, Variances, Waivers, Exceptions, Deviations and Development Agreements shall be consistent with the spirit and intent of the General Plan.

UDC 19.16.010(A) (emphasis added).

> It is the intent of the City Council that all regulatory decisions made pursuant to this Title be consistent with the General Plan.... For purposes of this Section, "consistency with the General Plan" means not only consistency with the Plan's land use and density designations, but also consistency with all policies and programs of the General Plan, including those that promote compatibility of uses and densities, and orderly development consistent with available resources.

UDC 19.00.040. Consistency with the General Plan has long been acknowledged by this Court's jurisprudence. *See City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 266, 236 P.3d 10, 12 (2010); *Nova Horizon, Inc. v. City Council of Reno*, 105 Nev. 92, 96, 769 P.2d 721, 723 (1989). The Attorney General Opinion on which the Developer relies supports the City's interpretation of NRS 278.349(3)(e), not the Developer's: "[T]he correct procedure is to amend the master plan rather than to erode the master plan by simply refusing to adhere to its guidelines." 1984 Nev. Op. Att'y Gen. 19 (1984).

The "eminent domain law" invoked by the Developer does not affect the primacy of the General Plan because none of the cases the Developer cites stand

for the proposition that zoning creates a property interest that can be "taken" by the denial of a discretionary land use application. Answer 30. Indeed, the language the Developer quotes from *City of Las Vegas v. C. Bustos* addressed valuation in a direct condemnation case, not the agency's liability for a taking. 119 Nev. 360, 362, 75 P.3d 351, 362 (2003). Nor could it, because liability for the taking is not at issue in an eminent domain action. Likewise, *Andrews v. Kingsbury Gen. Imp. Dist. No. 2*, 84 Nev. 88, 89, 436 P.2d 813, 813 (1968), was a direct condemnation case where the dispute was over damages.

In *Clark Cty. v. Alper*, 100 Nev. 382, 385, 685 P.2d 943, 945 (1984), the parties stipulated that the County had already taken physical possession of the property for a road-widening project, so the only issue dispute was valuation, not liability. The issue in *Alper v. State, Dep't of Highways*, involved interpretation of the federal Highway Beautification Act, 23 U.S.C. §131, not whether zoning creates a vested property interest. 95 Nev. 876, 878, 603 P.2d 1085, 1086 (1979), on reh'g sub nom. *Alper v. State*, 96 Nev. 925, 621 P.2d 492 (1980). *Sisolak* involved a regulation that authorized the physical invasion of private property. 122 Nev. at 672, 137 P.3d at 1128. The Court considered property's zoning for the purpose of valuation. *See id.* None of these cases supports the misguided notion that zoning establishes a vested property interest that is "taken" if a discretionary application for a use allowed within the zoning district is denied.

This substantive law applies equally to original claims and petitions for judicial review. In a constitutional challenge to denial of a building permit (i.e., not a PJR case), this Court squarely rejected the notion that owners have vested rights in a discretionary land use approval. *Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 246, 871 P.2d 322, 325 (1994). The Developer's Answer ignores this binding authority.

Additionally, the Developer distorts *City of Henderson v. Eighth Jud. Dist. Ct.*, 137 Nev. Adv. Op. 26, 489 P.3d 908, 912 (2021), beyond recognition. Recognizing that "civil actions and judicial review proceedings are fundamentally different," and focusing on the different procedures, scope of review and allowable evidence that are used in each, the Court in *Henderson* concluded that the two types of proceedings should not be combined. *Id.* The Court said nothing about the substantive law that should be applied. *See id.* It has long been established that the same land use law applies to original claims and PJRs. *Compare Boulder City*, 110 Nev. at 242, 871 P.2d at 322 *to Stratosphere Gaming*, 120 Nev. at 527-28, 96 P.3d at 759-60.

b. The Evidence Cited By The Developer Does Not Establish Any Type Of Taking

Although the Developer fills its Answer with a host of inflammatory material, it only identifies three City actions in its takings analysis: (1) denial of the Application (which sought a General Plan Amendment and Site Development

Review) and a Master Development Agreement application; (2) denial of the applications for new fencing and access points; and (3) adoption of bills related to golf course repurposing. Answer 19, 33-35. These actions are described in more detail in Section A(2)(b) *supra* and did not authorize public use, obstruct the Developer's access, or dispossess the Developer. They also did not deny "all economic use" of the Badlands or render it valueless because the City approved 435 luxury condominiums in the Badlands parcel as a whole, and the Developer did not ripen its claims by obtaining a final decision from the City as to the extent of development the City might allow. Indeed, in its Answer, the Developer does not even address the parcel-as-a-whole doctrine or the substantial development the City permitted in the PRMP and the Badlands, which conferred a multi-million-dollar benefit to the Developer.

The Answer also does not address that, under *Penn Central* and the long-standing PR-OS designation of the Badlands under the General Plan, the Developer could not have a reasonable expectation that it could convert the designated open space into houses. The Developer's own appraiser concluded that if the 35-Acre Property could not be developed with housing, it had a zero value. 17RA3682. Accepting *arguendo* the appraiser's conclusion, the Badlands was worth zero when the Developer bought the property because the PR-OS designation was in effect at that time, and as Judge Williams found, the Developer

was aware of it. I(0135). By simply declining to lift the PR-OS designation (*i.e.*, maintaining the status quo), the City could not have changed the value of the 35-Acre Property. As a result, the Developer cannot establish a categorical taking or *Penn Central* taking.

5. Statements Of Individual Council Members Or City Officials Do Not Have The Force Of Law To Give Rise To A Taking

The Developer improperly references statements by individual City Councilmembers and employees, which do not constitute official City action, to support its takings claims. "A city can act by and through its governing body; statements of individual council members are not binding on the city." *City of Corpus Christi v. Bayfront Assocs., Ltd.*, 814 S.W.2d 98, 105 (Tex. Ct. App. 1991). A "city can speak only through its council." *Pac. Tel. & Tel. Co. v. City of Seattle*, 14 F.2d 877, 880 (W.D. Wash. 1926).

This principle is consistent with Nevada's Open Meeting Law, pursuant to which the City can adopt laws only through the City Council at a properly noticed public meeting that meets all statutory requirements. *See* NRS 241.015; NRS 241.020; NRS 241.035; NRS 241.036; *see also Comm'n on Ethics of the State of Nevada v. Hansen*, 134 Nev. 304, 307, 419 P.3d 140, 142 (2018) (discussing when action by board is required). A public body composed of elected officials, such as the Las Vegas City Council, may not act except by vote of a majority of those elected officials. NRS 241.0355(1). Statements of individual Councilmembers that

do not comply with these statutory requirements are not laws, have no legal force, and do not bind the City government. And because individual City employees cannot establish City policy or make land use decisions that Chapter 278 obligates the City Council to make, none of the statements referenced by the Developer is relevant to the Court's analysis of whether a taking occurred here.

CONCLUSION

NRS 37.170 does not apply to this case or deprive the City of its right to an immediate stay without bond. NRAP 8(c) militates in favor of a stay. As a result, the City respectfully requests that the Court stay the Judgment and Additional Sums pending appeal.[1]

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[1] Since the filing of this Writ Petition, the district court entered a final appealable order, and the City filed its appeal and motion to stay (Case No. 84345). Should the Court determine that writ relief is not warranted in light of the pending appeal, the City respectfully asks the Court to grant the motion to stay in Case No. 84345.

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 15th day of March, 2022.

BY: /s/ Debbie Leonard

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font, Times New Roman style. The brief contains 5,333 words, which complies with the type-volume limitation of NRAP 21(d) and NRAP 32(a)(7).

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15th day of March, 2022 BY: /s/ Debbie Leonard

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Leonard Law, PC, and a copy of the foregoing document was electronically filed with the Clerk of the Court for the Nevada Supreme Court on today's date by using the Nevada Supreme Court's E-Filing system (E-Flex). Upon the Clerk's docketing of this case and e-filing of the foregoing document, participants in the case who are registered with E-Flex as users will be served by the E-Flex system. Others not registered will be served via U.S. mail at the following addresses on March 16, 2022.

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